RECORD AND BRIEFS

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No. 15-1031

In the Supreme Court of the United States

JOHN HOWELL, PETITIONER

v.

SANDRA HOWELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ILANA H. EISENSTEIN
Assistant to the Solicitor General
ALISA B. KLEIN
KATHERINE TWOMEY ALLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

When the parties divorced and their property was divided, petitioner agreed that, going forward, he would pay respondent 50% of his military retirement pay each month. Petitioner later waived a portion of his retirement pay in favor of veterans' disability benefits, resulting in a reduction of the monthly payments made to respondent. The family court ordered petitioner to indemnify respondent for the amount of that reduction. The question presented is as follows:

Whether the state court's order violated the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, as interpreted in *Mansell* v. *Mansell*, 490 U.S. 581 (1989).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

Petitioner is a veteran who waived a portion of his military retirement pay in order to receive veterans' disability benefits. One effect of that waiver was to reduce the amount of the monthly payments that petitioner made to his ex-wife (respondent in this Court) under a prior divorce decree. The question presented in this case is whether a State, consistent with the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, as interpreted in *Mansell* v. *Mansell*, 490 U.S. 581 (1989), may order petitioner to indemnify respondent for the amount of that reduction. The United States has an interest in the proper resolution of that question because the military services branches and the Department of Veterans Affairs are charged with the administration of the statutes that regulate the distribution of military retirement pay and veterans' disability benefits. At the

Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. a. This case concerns two types of veterans' benefits: retirement pay and disability benefits. Members of the military who have served the requisite number of years may retire and receive retirement pay. 10 U.S.C. 3911 *et seq.* (U.S. Army); 10 U.S.C. 6321 *et seq.* (U.S. Navy and U.S. Marine Corps); 10 U.S.C. 8911 *et seq.* (U.S. Air Force). In addition, veterans who become partially or totally disabled as a result of their military service may be eligible for disability benefits. 38 U.S.C. 1110 (wartime disability); 38 U.S.C. 1131 (peacetime disability). In general, however, a military retiree may receive disability benefits only to the extent that he or she waives a corresponding amount of retirement pay. 38 U.S.C. 5305.[1] Such waivers are common because disability benefits, unlike retirement pay, are exempt from taxation. 38 U.S.C. 5301(a); see *Mansell* v. *Mansell*, 490 U.S. 581, 583-584 (1989).

b. In *McCarty* v. *McCarty*, 453 U.S. 210 (1981), this Court held that federal law preempts state courts from treating any portion of a servicemember's retirement pay as community property divisible between a servicemember and a former spouse upon divorce. *Id.* at 232-235.

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[1] Under Section 641 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1511 (codified primarily at 10 U.S.C. 1414), a servicemember who did not retire based on a determination of medical unfitness and is at least 50% disabled will be entitled to receive both retirement pay and disability benefits without waiving any portion of the retirement pay. Petitioner is 20% disabled, Pet. App. 3a, so that provision does not apply here.

Congress responded to *McCarty* by enacting the Uniformed Services Former Spouses' Protection Act (Spouses' Protection Act or Act), 10 U.S.C. 1408. The Spouses' Protection Act authorizes a state court to "treat disposable retired pay * * * either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. 1408(c)(1). The Act defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled," less certain amounts, including the amount waived "in order to receive compensation under * * * title 38"—*i.e.*, the amount of retired pay waived to receive disability benefits. 10 U.S.C. 1408(a)(4)(B).

In *Mansell*, this Court construed the Spouses' Protection Act to foreclose state courts from treating as community property the portion of military retirement pay that a veteran has waived in order to receive disability benefits. See 490 U.S. at 588-589. The veteran in *Mansell* had waived a portion of his retirement pay, and had begun to receive disability benefits, before the parties were divorced. See *id.* at 585. The settlement agreement between the parties specifically provided for the division of the former military member's "total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability benefits." *Id.* at 586.

The *Mansell* Court recognized that "domestic relations are preeminently matters of state law," and that Congress "rarely intends to displace state authority in this area." 490 U.S. at 587. The Court concluded, however, that the case before it "present[ed] one of those rare instances where Congress has directly and specifically legislated in the area of domestic rela-

tions." *Ibid.* The Court held that, under the Spouses' Protection Act's "plain and precise language, state courts have been granted the authority to treat *disposable* retired pay as community property," but "have not been granted the authority to treat *total* retired pay as community property." *Id.* at 589 (emphases added). The Court concluded that the Act "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 594-595.

2. a. In 1991, petitioner John Howell and respondent Sandra Howell divorced in Arizona, and the family court entered a decree of dissolution "[p]ursuant to the parties' agreement." Pet. App. 2a. The decree provided for the disposition of the parties' personal property, their cars and associated debts and liens, and their 1990 tax refund. *Id.* at 41a. The decree also ordered petitioner to pay child support of $585 per month, *id.* at 42a, and to pay respondent "as and for spousal maintenance the amount of $150.00 per month until" petitioner's anticipated retirement in October 1992, *id.* at 43a. The decree further provided that "[respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [petitioner's] military retirement when it begins through a direct pay order." *Id.* at 41a. The parties agree that, under Arizona law, the family court's entry of the dissolution decree gave respondent a vested property right to her share of military retirement pay. *Id.* at 11a.

In the year after the divorce, petitioner retired from the Air Force, and the parties began to receive military retirement pay. Pet. App. 2a-3a. In 2005,

petitioner qualified for a 20% disability rating based on a service-connected shoulder injury, and he elected to waive a corresponding portion of his military retirement pay to receive disability benefits. *Id.* at 3a. That waiver had the effect of reducing respondent's monthly share of petitioner's retirement pay by approximately $125 per month, while increasing petitioner's monthly pre-tax receipts (from retirement pay and disability benefits combined) by a corresponding amount. *Ibid.*; see *id.* at 33a.

b. Respondent moved to enforce the decree's division of military retirement pay, and the family court granted her motion. Pet. App. 31a-38a. The court found that the divorce agreement had given respondent "a vested interest in fifty percent of the military retirement," and that under Arizona law, petitioner "could not unilaterally divest her interest in the retirement." *Id.* at 35a. The court held that petitioner had "violated the [divorce] decree by unilaterally decreasing the retirement pay in favor of disability," which impinged on respondent's vested property right to 50% of the full military retirement-pay amount. *Id.* at 36a. The Arizona Court of Appeals affirmed. *Id.* at 21a.

c. The Supreme Court of Arizona affirmed the family court's opinion.[2] Pet. App. 1a-14a. The court

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[2] Petitioner did not raise a federal preemption defense in the family court, raising this argument for the first time in the Arizona Court of Appeals. Pet. App. 20a-21a. The court of appeals declined to consider the argument on the ground that it had been waived below. *Ibid.* The Supreme Court of Arizona, however, decided as a matter of discretion to entertain and resolve petitioner's argument that the Spouses' Protection Act preempted the family court's indemnification order. *Id.* at 5a.

determined that the Spouses' Protection Act did not preempt the family court's indemnification order. *Id.* at 7a-8a. The court noted that respondent "was awarded fifty percent of the [military retirement pay] years before [petitioner] unilaterally elected to receive disability pay in lieu of a portion of the [military retirement pay]." *Id.* at 7a. The court concluded that "[n]othing in the [Act] directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of [military retirement pay]." *Id.* at 8a. The court observed that the indemnification order did not "divide the [military retirement pay] subject to the VA waiver, order [petitioner] to rescind the waiver, or direct him to pay any amount to [respondent] from his disability pay." *Id.* at 7a.

The Supreme Court of Arizona also found the family-court order proper as a matter of Arizona state law. Although the parties' 1991 divorce decree did not expressly require indemnification in the circumstances presented here, its effect under Arizona law was to "create[] an immediate right to future pay of fifty percent of the [military retirement pay], including cost-of-living increases, earned during the marriage." Pet. App. 13a. The court explained that, once that right had vested, "[o]ne spouse cannot invoke a condition solely within his or her control to defeat the community interest of the other spouse." *Ibid.* (citing *Koelsch* v. *Koelsch*, 713 P.2d 1234, 1239 (Ariz. 1986) (en banc)).[3] The court found that, "[b]y electing the

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[3] An Arizona statute enacted in 2010 (Ariz. Rev. Stat. Ann. § 25-318.01 (Supp. 2015)) provides that a state court in disposing of marital property may not "[i]ndemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or

VA waiver, [petitioner] did precisely that by essentially converting part of [respondent's military retirement pay] share," and that the family court's indemnification order "restored [respondent's] share of community assets." *Ibid.*

SUMMARY OF ARGUMENT

The original 1991 divorce decree in this case did not divide military retirement pay that had been waived in favor of disability benefits. Petitioner's disability waiver occurred well *after* the divorce decree and division of marital property. See Pet. App. 2a-3a. The family court's 2014 indemnification order likewise did not purport to divide the waived retirement pay as marital property. Rather, the family court applied Arizona's generally applicable contract and property law to hold that respondent's right to the value of disposable retirement pay had vested at the time of divorce, and to indemnify her for the economic loss she had suffered due to petitioner's unilateral, post-settlement action. *Id.* at 12a-13a. The Spouses' Protection Act does not preclude Arizona courts from enforcing those state-law rules.

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reduction in military retired or retainer pay related to the receipt of [veterans'] disability benefits." Pet. App. 9a. Although the Supreme Court of Arizona found that the family-court order in this case "modifies rather than enforces the dissolution decree's property disposition terms," *id.* at 10a, the court declined to apply Section 25-318.01 to bar indemnification because that statute was passed after the original divorce decree in this case. The court concluded that "the family court correctly refused to apply § 25-318.01 to these facts" because "application of § 25-318.01 to prohibit the court from remedying the deprivation would diminish [respondent's] vested property right in violation of the [Arizona constitution's] due process guarantee." *Id.* at 14a.

1. Because this case involves difficult questions of state domestic-relations law, the presumption against preemption applies and limits the preemptive force of the Spouses' Protection Act to its clear and precise terms, or to applications of state law that manifestly conflict with federal policy.

2. The Spouses' Protection Act prevents state courts from dividing waived military retirement pay as marital or community property, but it does not preempt state courts from ordering indemnification if a veteran waives military retirement pay after his divorce has been finalized and that waiver damages the severed property interests of his former spouse. The Act defines "disposable retired pay" to exclude only that portion of military retirement pay that has already been waived in favor of disability benefits at the time of the veteran's divorce, and it expressly authorizes state courts to treat "disposable retired pay" as community property of the veteran and his spouse if state law so dictates.

Similarly, the Act reflects Congress's intent to preserve well-established state-law rules that promote certainty, equity, and finality in divisions of property upon divorce. Indemnification is one such remedy. During divorce proceedings, the court and the parties must typically balance a range of factors (including existing disability waivers) to arrive at an equitable property division or a mutually-agreeable property settlement, and to determine whether additional forms of relief (*e.g.*, alimony or child support) are warranted. Although federal law precludes state courts from treating waived retirement benefits as divisible marital property, it otherwise leaves the state courts free to determine whether and how to

divide a veteran's disposable military retirement pay and other marital property. See 10 U.S.C. 1408(c)(1). Once a divorce is finalized, however, the disposable retired pay is permanently severed. A veteran's subsequent waiver of military retirement pay then impinges on the separate interests of his former spouse. The Act does not prohibit States from giving the former spouse a remedy in such circumstances.

Thus, although an indemnification order and a division of property may have similar *economic* effects on the veteran's financial circumstances, the two are not *legally* equivalent. The practical consequences of pre- and post-divorce waivers also differ substantially. When a veteran has already waived retirement pay at the time a divorce decree is entered, the trial court and the parties can take that waiver (and the consequent reduction in the spouse's share of retirement pay) into account in dividing other property and in determining whether other forms of relief are appropriate. But a post-divorce waiver may disturb the state court's careful equitable balance and the parties' settled expectations. There are consequently good reasons for Congress to preempt state courts from dividing military retirement pay waived prior to divorce, but to permit States to protect former spouses against post-divorce waivers. Congress's failure to override States' widespread recognition of indemnification for post-divorce waivers of military retirement pay further suggests that Congress views such remedies as consistent with federal law and policy.

3. The Spouses' Protection Act is designed to protect the interests of both the veteran and his former spouse. Congress determined that the application of state marital-property principles, with limited and

precisely defined exceptions, best protected those interests. Congress has further protected veterans' disability benefits by exempting them from taxation and insulating them from attachment. This Court has made clear, however, that Congress intended veterans' disability benefits to support not only veterans, but also their families. See *Rose* v. *Rose*, 481 U.S. 619, 630 (1987). An order of indemnification that enforces prior property divisions, to the extent it comports with anti-attachment limitations, does not conflict with those interests.

Allowing state-law indemnification remedies in the circumstances presented here will not create the illogical results suggested by petitioner. The Spouses' Protection Act reflects Congress's recognition that state trial courts are best positioned to determine the appropriate equitable division of military retirement pay in the initial formulation of divorce decrees. The state courts are similarly well-equipped to enforce such orders fairly in light of any changed circumstances following the divorce.

ARGUMENT

THE SPOUSES' PROTECTION ACT ALLOWS STATES TO ORDER INDEMNIFICATION IF A VETERAN'S POST-DIVORCE DISABILITY WAIVER REDUCES HIS FORMER SPOUSE'S SHARE OF PREVIOUSLY DIVIDED MILITARY RETIREMENT PAY

A. The Presumption Against Preemption Requires A Narrow And Limited View Of The Act's Preemptive Force

Federal law preempts conflicting state law. Such a conflict exists when "compliance with both federal and state regulations is impossible" or when state law

"stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1950 (2013) (citation omitted). The "ultimate touchstone" for determining "the scope of a [federal] statute's preemptive effect" is the "purpose of Congress." *Hughes* v. *Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (brackets in original) (quoting *Altria Grp., Inc.* v. *Good*, 555 U.S. 70, 76 (2008)).

The presumption against preemption applies to the Spouses' Protection Act and limits its preemptive scope. This Court has long recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890). State courts have "unparalleled familiarity with local economic factors affecting divorced parents and children," and significant experience applying state statutes containing "detailed support guidelines and established procedures for allocating resources following divorce." *Rose* v. *Rose*, 481 U.S. 619, 628 (1987). The "theory and the precedents" of this Court teach "solicitude for state interests, particularly in the field of family and family-property arrangements," where "[e]ach State has its complex of family and family-property arrangements." *United States* v. *Yazell*, 382 U.S. 341, 352 (1966).

This Court accordingly has applied "a presumption against pre-emption of state laws governing domestic relations," *Hillman*, 133 S. Ct. at 1950 (citation and internal quotation marks omitted), which requires Congress to speak clearly if it intends federal law to displace state law and the traditional role of state

courts in that sphere. See, *e.g.*, *Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989); *Rose*, 481 U.S. at 625, 628. In accordance with that presumption, "[o]n the rare occasion when state family law has come into conflict with a federal statute, [the] Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979) (citation omitted); see *Mansell*, 490 U.S. at 587. Alternatively, "a state law governing domestic relations" is preempted if it does "major damage to clear and substantial federal interests." *Rose*, 481 U.S. at 625 (citation and internal quotation marks omitted).

Petitioner contends (Br. 36) that the presumption against preemption is inapplicable to the Spouses' Protection Act. In *Mansell*, however, this Court applied the presumption and held the relevant state-court order to be preempted only after finding that the presumption had been overcome by the Act's plain terms. 490 U.S. at 587 (describing the presumption and stating that the case before the Court "present[ed] one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations"). The Court concluded that, "under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property." *Id.* at 589. Similarly, the Court in *McCarty* v. *McCarty*, 453 U.S. 210 (1981), did not hold that the strong federal interests in regulating military benefits and veterans' rights eliminated the presumption against preemption of state domestic-

relations law; instead, it found that a clear conflict with federal interests sufficed to overcome the presumption. See *id.* at 220-221, 232.

Petitioner contends (Br. 37) that *Mansell* disavowed the presumption against preemption when it stated that, because *McCarty* construed "pre-existing federal law" to "completely pre-empt[] the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." 490 U.S. at 588. As explained below, however, the Court in both *McCarty* and *Mansell* addressed only whether a state court could treat as community property, divisible upon divorce, retirement pay that had *already* been waived. In this case, by contrast, the state courts did not purport to treat waived retirement pay as community property. Rather, the family court imposed, and the state appellate courts approved, an indemnification remedy designed to enforce a division of marital property that predated petitioner's waiver and was indisputably valid at the time it was entered. *Mansell* does not suggest that the presumption against preemption should be disregarded in determining the permissibility of that distinct indemnification remedy.

This case involves delicate state-law questions concerning what remedial measures are available when a divorced veteran takes unilateral action that reduces the value of his former spouse's share of previously divided marital assets. Family courts are best positioned to determine how to fairly allocate marital property and to assess the impact of unanticipated changed circumstances on that distribution. The

purpose behind the presumption against preemption therefore applies fully here. Given Congress's and this Court's solicitude for state interests in the area of domestic relations, any doubt as to whether Congress preempted indemnification orders should be resolved in favor of preserving state authority.

B. Once Disposable Retired Pay Has Been Divided Through A Final Divorce Decree, A State Court May Order Indemnification To Protect The Separate Property Interests Of The Non-Veteran Spouse

The Court in *Mansell* held that the Spouses' Protection Act, read in light of the Court's prior decision in *McCarty*, forecloses state courts from "treat[ing] as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 595. The Act does not specifically address the authority of state courts to respond to post-divorce waivers. Rather, the Act recognizes that divisible "disposable retired pay" should be measured at the time of divorce. After the divorce decree becomes final, the divided portion of retired pay becomes the parties' separate assets. Under the Act's terms, moreover, the divided interest may be fixed, and need not fluctuate with a veteran's subsequent unilateral decision to elect a disability waiver.

A post-divorce waiver therefore may impinge on the separate property interests of the former spouse. Congress has not preempted state remedies, such as indemnification, that are designed to protect the certainty and finality of divorce decrees. Appellate courts in 33 States have permitted such orders and, despite numerous amendments to the Act, Congress has not overridden those decisions. Congress therefore has not displayed any clear intent to preempt

States from ordering indemnification to account for a post-divorce waiver of military retirement pay.

1. The text and structure of the Spouses' Protection Act support state authority to enforce a valid division of "disposable retired pay" as calculated at the time the divorce became final

The text and structure of the Spouses' Protection Act establish that the measure of divisible "disposable retired pay" is made before the divorce is finalized. The Act defines "disposable retired pay" in the present tense to be the "monthly retired pay to which a member *is entitled* less amounts" which "*are deducted* * * * as a result of a waiver of retired pay [in favor of disability benefits]," 10 U.S.C. 1408(a)(4)(B) (emphases added); see *Carr* v. *United States*, 560 U.S. 438, 448 (2010) (observing that, "[c]onsistent with normal usage," the Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach"). Similarly, the Court in *Mansell* noted that "the [Act] does not grant state courts the power to treat as property divisible upon divorce military retirement pay that *has been waived* to receive veterans' disability benefits." 490 U.S. at 594-595 (emphasis added).

A recent amendment to the Act's definition of "disposable retired pay" bolsters the conclusion that its value should be determined at the time of the divorce decree. That amendment instructs courts to value "total monthly retired pay" based on "the member's pay grade and years of service *at the time of the court order*, as increased by" cost-of-living adjustments. National Defense Authorization Act for Fiscal Year 2017 (2017 National Defense Authorization Act), Pub. L. No. 114-328, § 641, 130 Stat. 2163 (emphasis add-

ed).[4] Congress thus clarified that the divisible marital property does not include future increases to a servicemember's retirement pay attributable to post-divorce raises in pay grade or subsequent years of military service. H.R. Rep. No. 840, 114th Cong., 2d Sess. 1056-1057 (2016). By the same token, courts in valuing "disposable retired pay" at the time of divorce are not required, and could not reasonably be expected, to assess the possibility that such pay will decrease due to a veteran's subsequent decision to elect disability benefits.

In addition, the Act defines "court order" to include a divorce decree that, "in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member." 10 U.S.C. 1408(a)(2)(C). If the family court in the original divorce proceeding had ordered petitioner to pay respondent a specific monthly sum once petitioner began to receive military retirement benefits, the Act could not reasonably be thought to preempt continued enforcement of that directive after petitioner elected to receive disability benefits in lieu of a portion of his retired pay.[5] By instead directing

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[4] That amendment applies prospectively to divorce decrees finalized after the enactment date of the 2017 National Defense Authorization Act. See § 641(b), 130 Stat. 2163.

[5] See, *e.g.*, *In re Marriage of Lodeski*, 107 P.3d 1097, 1100 (Colo. App. 2004) (enforcing division of property awarding wife $436 as her share of husband's military retirement pay "in spite of his [subsequent] unilateral waiver of retirement benefits"); *McHugh* v. *McHugh*, 861 P.2d 113, 115 (Idaho Ct. App. 1993) ("The parties negotiated for and *mutually agreed* to a division of the military retired pay which granted [the former spouse] a specific monthly

petitioner to pay a percentage (50%) of his disposable retired pay, the divorce decree ensured, *inter alia*, that respondent would benefit from subsequent cost-of-living increases in petitioner's retired pay. See Pet. App. 12a-13a. But neither the Spouses' Protection Act's definition of "court order," nor any other provision of the Act, suggests that the Act's preemptive scope should vary dramatically depending on the family court's choice between a percentage and a specific dollar amount in formulating the original divorce decree.

2. The Act permits States to adopt rules and impose remedies designed to prevent divorced veterans from unilaterally reducing the amounts to which their ex-spouses are entitled under the terms of their divorce decrees

In enacting the Spouses' Protection Act, Congress sought to mitigate the inequity of a preemption rule that would deprive the non-military spouse of access to her marital share of military retirement pay. See *Mansell*, 490 U.S. at 593 (explaining that Congress enacted the Act in recognition of "the distressed economic plight of military wives after a divorce"). Congress determined that, subject to the limited exception that waived retirement pay cannot be treated as marital property, application of state marital-property principles would best protect the economic interests of both military spouses and military members. See *id.* at 593-594; see also S. Rep. No. 502, 97th Cong., 2d

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sum. They further agreed that this sum would not be increased or decreased in the future 'for any reason' except by the application of cost-of-living increases. The two supplemental orders issued by the court did not alter this agreed-to division of the asset, but served simply to enforce it.") (footnote omitted).

Sess. 6 (1982) (1982 Senate Report). By authorizing state courts to treat disposable retired pay "in accordance with" state law, 10 U.S.C. 1408(c)(1), Congress "return[ed] to the States the authority to treat military pensions in the same manner as they treat other retirement benefits." 1982 Senate Report 10.[6] Accordingly, the Act preserves state procedures designed to improve certainty, maintain equity, and promote finality in dividing marital property upon divorce.

In the vast majority of States, trial courts are not required to mechanically split marital property 50-50.[7] Rather, the process of equitably dividing property and awarding alimony and child support (or the parties' negotiation of those terms) requires painstaking and delicate balancing of a host of equitable factors.[8] A

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[6] The final House Conference Report incorporated that section of the 1982 Senate Report. H.R. Conf. Rep. No. 749, 97th Cong., 2d Sess. 168 (1982).

[7] States are divided among two property-division systems: equitable division and community property. Equitable division is by far the dominant rule among the States, while only nine States apply community-property principles. Although many States employ a presumption of equal division, the strength of that presumption varies, and most States afford trial courts broad discretion to determine the equitable division of property. See American Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 4:09, at 732 (2002). Only three community-property States—California, Louisiana, and New Mexico—require "equal division" of the marital estate. See *id.* at 22 & n.31.

[8] Commonly used factors in the equitable division of property include the parties' contributions to the marriage, the duration of the marriage, the parties' future financial needs, and the parties' separate property and liabilities. 2 Brett R. Turner, *Equitable Distribution of Property* §§ 8:1-8:33 (3d ed. 2008) (providing

trial court must first value property, then weigh the equitable factors, and finally divide the property or approve the parties' property settlement in the final divorce decree. See 2 Brett R. Turner, *Equitable Distribution of Property* §§ 7:1, 8:1 (3d ed. 2008); see also 3 Arnold H. Rutkin, *Family Law and Practice* §§ 37.05-37.06 (2016) (Rutkin). In this case, for example, the 1991 divorce decree ordered petitioner to pay respondent monthly spousal maintenance only until the date of petitioner's anticipated retirement the following year, at which time respondent would become entitled to 50% of petitioner's military retirement pay. See Pet. App. 41a, 43a. Once the divorce decree finalizes the division of property, it cannot be modified without a compelling justification such as mistake, fraud, or error of law. See Rutkin § 37.06[2][d].

When a veteran is already receiving disability benefits due to a *pre*-divorce waiver of military retirement pay, the trial court and the parties in the divorce proceeding can take that fact into account in determining what *other* terms the divorce decree should contain and how those terms should be enforced. First, a veteran's disability benefits may be utilized, and, in the case of waived military retirement pay, garnished, to pay child support and alimony. See 42 U.S.C. 659(h)(1)(A)(ii)(V); see also *Rose*, 481 U.S. at 633-635. Second, the parties may consider a veteran's disability benefits when negotiating a property settlement.

Although the Spouses' Protection Act bars the treatment of waived retirement pay as divisible *prop-*

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detailed analysis of equitable factors); see also 3 Arnold H. Rutkin, *Family Law and Practice* § 37.06 (2016) (same).

erty, it does not preclude state courts from considering the veteran's *income* due to a disability waiver as one factor in equitably dividing property.[9] 1982 Senate Report 10 (recognizing that "most State courts" consider the parties' income even when dividing marital property) (citing Section 307 of the Uniform Marriage & Divorce Act); see Rutkin § 37.06[1][d][ii] (noting the "general rule" that earning capacity may "be considered a factor in dividing the marital estate, but not as an asset to be divided"). Courts may also consider the parties' health and disability, particularly as it bears on future economic needs. Rutkin § 37.06[1][d]. States therefore have substantial latitude to consider *pre*-divorce waivers of retired pay in crafting a fair and equitable overall settlement.[10]

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[9] The fact that veterans' disability benefits are characterized as income, not property, also provides a coherent explanation for why the Spouses' Protection Act excludes waived retirement pay from the marital estate, yet subjects both waived and non-waived military retirement pay to garnishment for payment of child support or alimony obligations. See *Rose*, 481 U.S. at 630 (observing that disability benefits are "compensat[ion] for impaired earning capacity"). By contrast, this Court has treated military retirement pay as a form of "deferred compensation," which is a type of property. *Barker* v. *Kansas*, 503 U.S. 594, 599 (1992); see *id.* at 603 (noting that, if the Court had characterized military retirement pay as "current income," the *McCarty* decision "would have been simple" because income is not subject to community-property division).

[10] See, *e.g.*, *Clauson* v. *Clauson*, 831 P.2d 1257, 1263-1264 (Alaska 1992) ("We are aware of no federal statute which specifically prohibits a trial court from taking into account veterans' disability benefits when making an equitable allocation of property," provided the trial court does not "simply shift an amount of property equivalent to the waived retirement pay" from the veteran to the spouse.); *In re Marriage of Kraft*, 832 P.2d 871, 875 (Wash. 1992) (en banc) (noting that, following *Mansell*, the "general rule de-

The entry of a final divorce decree, however, marks a critical change in the ownership of marital property, which is converted into separate property of the parties. A veteran's election to waive retirement pay *after* the divorce is finalized may disrupt the careful balance struck by the trial court in its original decree or upset the parties' settled understanding in a negotiated settlement. Precluding state courts from ordering indemnification in circumstances like these therefore would intrude much more substantially on the States' authority over domestic relations than does the narrow rule announced in *Mansell* that States may not treat waived retirement pay as marital property.[11]

Petitioner is therefore wrong in suggesting (Br. 27-29) that the Supreme Court of Arizona's decision in

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rived" by state courts was that "the court may regard military disability retirement pay as future income to the retiree spouse and * * * consider it as an economic circumstance of the parties," but it "may not * * * divide or distribute the military disability retirement pay as an asset").

[11] See, *e.g.*, *Shelton* v. *Shelton*, 78 P.3d 507, 509 (Nev. 2003) ("Although states cannot divide disability payments as community property, states are not preempted * * * from enforcing contracts [that divide retirement benefits] * * *, even when disability pay is involved."), cert. denied, 541 U.S. 960 (2004); *Resare* v. *Resare*, 908 A.2d 1006, 1010 (R.I. 2006) ("[T]he Family Court did not in any way divide [the veteran's] *disability* benefit in contravention of *Mansell*, but simply held [the veteran] to the terms of the original [property settlement agreement]."); *Johnson* v. *Johnson*, 37 S.W.3d 892, 897-898 (Tenn. 2001) ("[W]hen a[] [marital dissolution agreement] divides military retirement benefits, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court's decree. * * * [A]n act of the military spouse [that unilaterally diminishes the vested interest] * * * constitutes an impermissible modification of a division of marital property.").

this case elevates form over substance. Neither *McCarty*, *Mansell*, nor the Spouses' Protection Act specifically addresses the propriety of state-court indemnification orders; rather, all three address only the circumstances under which military retirement pay can be divided as property. In light of the States' traditional authority over domestic relations, and the practical consequences that petitioner's proposed rule would entail, the Act's preemptive force should not be extended beyond what its text requires.

3. Congress's failure to override States' widespread approval of indemnification as a means to remedy a post-divorce disability waiver suggests that Congress viewed that approach as consistent with federal law and policy

The vast majority of States that have considered similar questions—including the highest courts of 12 States and intermediate courts in another 21 States—have concluded that, if a veteran waives military retirement pay after marital property has been divided pursuant to a final divorce decree, the ex-spouse may be entitled to monetary relief if the waiver impinges on her vested or contractual rights. See App., *infra*, 1a-5a (listing cases by State). Courts in at least six of those States, including the Supreme Court of Arizona below, have relied on a "vested rights" theory under which one divorcing spouse is precluded from taking unilateral action that would dissipate, convert, or defeat property rights assigned to the other spouse. *Ibid.*[12] Despite numerous amendments to the Spouses'

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[12] While two state supreme courts (Alabama and Vermont) and two intermediate appellate courts (in Kansas and Kentucky) have rejected relief under the circumstances of the cases before them,

Protection Act and other military family-law statutes (see Pet. Br. 40-43), however, Congress has not explicitly precluded state courts from ordering indemnification under circumstances like those presented here.

Congressional silence in the face of state regulation is "powerful evidence" that Congress did not intend to preempt state law. *Wyeth* v. *Levine*, 555 U.S. 555, 575 (2009). "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-167 (1989) (brackets in original; citation and internal quotation marks omitted); see *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2237 (2014); *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2188 (2014).

Congress has amended the Spouses' Protection Act several times since its enactment in 1982, most recently on December 23, 2016.[13] As petitioner observes,

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none of those courts has ruled out the possibility that an express indemnification provision would be enforceable. See App., *infra*, 4a. Only one intermediate state court—the Texas Court of Appeals—has rejected an express indemnification provision, *Limbaugh* v. *Limbaugh*, 71 S.W.3d 1, 17 (2002), and only the Supreme Court of Mississippi and an intermediate appellate court in Ohio have explicitly rejected the "vested rights" rationale for post-waiver indemnification that the courts below invoked in this case, see *Mallard* v. *Burkart*, 95 So. 3d 1264, 1272 (Miss. 2012); *Konieczny* v. *Konieczny*, No. 97-CA-83, 1998 WL 401835, at *2 (Ohio Ct. App. Mar. 27, 1998).

[13] See 2017 National Defense Authorization Act, § 641, 130 Stat. 2163; National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 665, 119 Stat. 3317-3318; National Defense

Congress "has devoted scrupulous attention to family-law issues surrounding military benefits, constantly tinkering with the governing statutes." Br. 40. Indeed, when the House Committee was "concerned because some state courts ha[d] been less than faithful in their adherence to the spirit of the law" by reopening divorce cases finalized before *McCarty*, Congress directly addressed the problem by amending the statute. H.R. Rep. No. 665, 101st Cong., 2d Sess. 279 (1990); see National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1569. Given Congress's close attention to the interplay between state and federal law in this area, its failure to override the numerous state-court decisions ordering indemnification in these circumstances sug-

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Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 636, 110 Stat. 2579; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 362(c), 110 Stat. 2246-2247; National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 555, 107 Stat. 1666-1667.

Congress has also made numerous technical changes. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1073, 123 Stat. 2472-2473; Servicemembers Civil Relief Act, Pub. L. No. 108-189, § 2(c), 117 Stat. 2865-2866; Homeland Security Act of 2002, Pub. L. No. 107-296, § 1704(b), 116 Stat. 2314; National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 1048(c), 115 Stat. 1226; National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1073, 111 Stat. 1900-1901; National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1501(c), 110 Stat. 498-499; National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 1061(a), 105 Stat. 1472; National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, §§ 653(a), 1622(e), 103 Stat. 1461-1462, 1604-1605; Defense Technical Corrections Act of 1987, Pub. L. No. 100-26, § 7(h), 101 Stat. 282.

gests that Congress did not intend such remedies to be preempted by federal law.

C. Indemnification Orders Do Not Conflict With The Spouses' Protection Act's Purpose And Objectives—Including Its Treatment Of Veterans' Disability Benefits—And Therefore Are Not Impliedly Preempted By The Act

Indemnification to enforce a former spouse's property right arising out of a final division of property or contractual settlement agreement is consistent with the purposes and objectives of the Spouses' Protection Act. Although federal law is highly protective of veterans' military retirement pay and disability benefits, Congress has not chosen to protect veterans' interests to the exclusion of all other objectives, but rather has sought to achieve an appropriate balance between the interests of veterans and the interests of their former spouses. Use of indemnification to protect the expectations created by valid divorce decrees is consistent with that balance.

1. Congress's carefully delineated protections of veterans' disability benefits do not implicitly preempt indemnification orders not expressly barred by federal law

Congress has long displayed special concern for the needs of disabled servicemembers and veterans, and has enacted carefully delineated provisions to protect their interests. *Inter alia*, federal law exempts veterans' disability benefits from taxation, 38 U.S.C. 5301; prohibits creditors from attaching those benefits, see 38 U.S.C. 5301(a)(1); and preempts any state-law rule that would treat waived military retirement pay as divisible property, 10 U.S.C. 1408(a)(4) and (c)(1).

Congress has also been cognizant, however, of the interests of divorced veterans' ex-spouses. Congress enacted the Spouses' Protection Act, in direct response to *McCarty*, to alleviate "the distressed economic plight of military wives after a divorce," while also "protecting the interests of military members." *Mansell*, 490 U.S. at 593-594; see *id.* at 587; see also H.R. Conf. Rep. No. 749, 97th Cong., 2d Sess. 165 (1982); 1982 Senate Report 1-3, 16.

In light of its purpose to protect the interests of both parties, the Spouses' Protection Act's exclusion of waived military pay from the marital estate should not be taken to signify a broader congressional intent that "disabled veterans keep all of their disability pay." Pet. Br. 19; see *id.* at 20. To the contrary, this Court has recognized that military disability benefits "are not provided to support [the veteran] alone," but rather, that "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents." *Rose*, 481 U.S. at 630-631.[14] Indeed, although disability benefits received in lieu of waived retirement pay may not be treated as divisible property, those benefits may be used, for example, "to 'provide reasonable and adequate compensation for veterans *and their families*'" through court-ordered child support or alimony. *Id.* at 630 (citation omitted);

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[14] *Rose* involved a Tennessee court order under which a disabled veteran was required to support his children from a former marriage. 481 U.S. at 622. The Court concluded that the anti-attachment provision in former 38 U.S.C. 3101(a) (1988) (recodified at 38 U.S.C. 5301(a)(1)) did not foreclose the state court from holding the veteran in contempt for failure to comply with the support order, even though the veteran's limited income would require him to use his disability benefits to pay fully the ordered support. 481 U.S. at 630-633.

see 42 U.S.C. 659(h)(1)(A)(ii)(V) (subjecting disability pay received in lieu of waived retirement pay to garnishment for child-support and alimony obligations). That nuanced scheme suggests that Congress did not intend to implicitly preempt a broader swath of state domestic-relations law. Cf. *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").[15]

This Court in *Rose* further distinguished veterans' disability benefits from the benefit schemes that were at issue in cases cited by petitioner (Br. 20-22)—*Ridgway* v. *Ridgway*, 454 U.S. 46 (1981), *Hisquierdo*, 439 U.S. 572, and *Wissner* v. *Wissner*, 338 U.S. 655 (1950). In those cases, this Court held that state domestic-relations law was preempted by anti-attachment provisions similar to Section 5301(a)(1). *Rose*, 481 U.S. at 633; see *id.* at 631-632. In each of those cases, federal law either made the retiree "the exclusive beneficiary" of federal benefits, see *Ridgway*, 454 U.S. at 55-60; *Hisquierdo*, 439 U.S. at 583; or gave the retiree "an express right to designate the beneficiary" of a federal insurance policy, see *Wissner*, 338 U.S. at 658-659. See also *Rose*, 481 U.S. at 631-633. This Court held that the operation of state community-property principles, which required dividing those benefits with the retiree's ex-spouse, conflicted with "Congress' precise specification of the intended beneficiary" (in *Hisquierdo*), *id.* at 632; or

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[15] But cf. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (observing that Congress's inclusion of an express pre-emption clause "does *not* bar the ordinary working of conflict pre-emption principles").

frustrated "Congress' unequivocal intent that the insured decide who should receive the [insurance] policy proceeds" (in *Wissner* and *Ridgway*), *id.* at 631, 633-634. With respect to veterans' disability benefits, by contrast, "Congress has not made [the veteran] the exclusive beneficiary," *id.* at 634, but rather has intended those benefits to provide income to support both the veteran and his family, *id.* at 630. The Court in *Rose* distinguished *Wissner*, *Hisquierdo*, and *Ridgway* on that basis.[16]

Congress thus has carefully fashioned the protections afforded to veterans' disability benefits, and has made clear that those benefits are intended in part to support the veteran's family. With respect to the veteran's support obligations to his children and for-

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[16] Veterans' disability benefits are therefore distinguishable from federal benefits that are expressly designed to be supplemental to the beneficiary's other income sources. In *Rose* v. *Arkansas State Police*, 479 U.S. 1 (1986) (per curiam), for example, this Court held that the federal scheme benefitting families of deceased law-enforcement officers, 42 U.S.C. 3796(e) (1982), preempted a state statute that diminished benefits available under state law by one dollar for every dollar of federal benefits that the families received. 479 U.S. at 3-4. This Court explained that "Congress plainly intended to give supplemental benefits to the survivors," and that States therefore could not reduce the benefits "it otherwise would provide to account for the federal payment." *Id.* at 4; see also *Hendrick* v. *New Hampshire Dep't of Health & Human Servs.*, 145 A.3d 1055 (N.H. 2016) (contrasting federal Social Security Disability Income, which is treated as a substitute for income to the beneficiary, with Supplemental Security Income, which is designed to supplement other benefits and is limited to the "use and benefit" of only the beneficiary). Unlike those federal schemes designed to supplement the beneficiary's other income and benefits, veterans' disability benefits are not protected from offsets that fulfill the veteran's obligations to his former spouse.

mer spouse, Congress has chosen to treat disability benefits received in lieu of military retirement pay like a veteran's other income, and has not shielded them from enforceable support orders. And while the anti-attachment statute, 38 U.S.C. 5301, may prevent direct attachment of a veteran's disability benefits, see Part D, *infra*, Congress has not otherwise limited state courts from ordering indemnification based on a waiver of military retirement pay if the veteran has other sources of income or property that may be used to satisfy the court order.

2. Allowing indemnification orders in circumstances like these will not lead to anomalous outcomes

The approach taken by the Arizona courts in this case, under which petitioner was ordered to indemnify respondent for the economic loss she suffered as a result of petitioner's post-divorce waiver of military retirement pay, does not create the stark economic discrepancy between pre- and post-divorce waivers that petitioner's hypotheticals suggest (see Br. 32-33, 47-49). When a veteran has waived retirement pay in favor of disability benefits *before* a divorce decree is entered, state courts and the divorcing spouses can take that fact into account in determining the appropriate division of other property and the propriety of awarding alimony and/or child support, at least so long as the marital estate includes assets beyond the veteran's disability pay. See Part B.2, *supra*.

Reading the Spouses' Protection Act to *permit* indemnification awards in these circumstances would not *require* any state court to award such relief, nor would it prevent courts from considering the full range of relevant equitable factors if a veteran's spouse engaged in the sort of gamesmanship that

petitioner hypothesizes (Br. 32-35). For example, nothing in the Act precludes adjustments to an equitable property division or support award if one party accelerates divorce proceedings in order to obtain a right to military retirement pay before a veteran can finalize his eligibility for disability benefits. Cf. *id.* at 32. States likewise may account for a veteran's waiver of military retirement pay intended to undermine the property interests of the non-veteran spouse in close proximity to or in contemplation of divorce. See *id.* at 35. Similarly, petitioner's conjecture that allowing indemnification would treat shorter-serving military members more favorably than those with lengthy service (see *id.* at 47-49) ignores a trial court's latitude to take account of disability benefits in initially dividing property and awarding alimony.

Petitioner's hypotheticals also ignore the unfairness of allowing one spouse to unilaterally undermine the careful balance that the family court reached when dividing marital assets. Adoption of the broad preemption rule that petitioner advocates could have other deleterious consequences as well. If a state court administering a divorce proceeding knew that a veteran could unilaterally reduce the amounts payable to his ex-spouse after the decree became final, the court might try to protect the non-veteran spouse by awarding her an increased share of other marital assets. That approach could produce unfairness to the veteran, particularly in cases where no post-divorce waiver of retirement pay ultimately occurs.

D. The Indemnification Order At Issue In This Case Does Not Implicate The Anti-Attachment Provision Applicable To Veterans' Disability Benefits

Under 38 U.S.C. 5301(a)(1) (formerly 38 U.S.C. 3101(a) (1988)), veterans' disability benefits are non-assignable, are exempt from the claims of creditors, and are not liable to attachment, levy, or seizure. Even if this Court affirms the Supreme Court of Arizona's holding with respect to the Spouses' Protection Act, Section 5301(a)(1) may sometimes impose practical impediments to the enforcement of indemnification orders like the one at issue here.[17]

In this case, however, petitioner has not argued that the Supreme Court of Arizona's decision was inconsistent with Section 5301(a)(1), and there is no indication that the money petitioner was ordered to pay would come out of his disability benefits. The family court did not "direct [petitioner] to pay any amount to [respondent] from his disability pay." Pet. App. 7a. And while "requiring [petitioner] to reimburse [respondent] diminishes the overall income increase he received when he elected the VA waiver," *id.* at 7a-8a, petitioner was still receiving approximately $610 per month in disposable retired pay and was ordered to pay respondent only an additional $127.50 per month (adjusted for cost of living), *id.* at

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[17] The veteran in *Mansell* argued that the state court's division of his total retired pay violated not only the Spouses' Protection Act, but also the statutory predecessor to Section 5301(a)(1). In light of its holding that the Spouses' Protection Act precludes the division as marital property of retirement pay waived in favor of disability benefits, the Court in *Mansell* found it unnecessary to address whether the anti-attachment provision would independently preclude such a division. See 490 U.S. at 587 n.6.

3a. See Pet. Br. 24 (acknowledging that the Arizona decree "did not directly interfere with [p]etitioner's receipt of his disability pay"). Section 5301(a)(1) therefore is not implicated in this case.

CONCLUSION

The judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ILANA H. EISENSTEIN
Assistant to the Solicitor General
ALISA B. KLEIN
KATHERINE TWOMEY ALLEN
Attorneys

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APPENDIX

STATE APPELLATE COURT DECISIONS ON AUTHORITY TO INDEMNIFY THE FORMER SPOUSE AFTER A VETERAN'S POST-DIVORCE WAIVER OF RETIREMENT PAY

Approving Indemnification

On Vested Property Rights Theory

1. **Arizona:** *In re Marriage of Howell*, 361 P.3d 936, 941 (Ariz. 2015), cert. granted *sub nom. Howell* v. *Howell*, 137 S. Ct. 546 (2016).

2. **California:** *Cassinelli* v. *Cassinelli*, 210 Cal. Rptr. 3d 311, 320 (Cal. Ct. App. 2016), review denied (Cal. Jan. 18, 2017).

3. **Illinois:** *In re Marriage of Nielsen & Magrini*, 792 N.E.2d 844, 849 (Ill. App. Ct. 2003).

4. **Indiana:** *Bandini* v. *Bandini*, 935 N.E.2d 253, 263 (Ind. Ct. App. 2010).

5. **New Jersey:** *Whitfield* v. *Whitfield*, 862 A.2d 1187, 1191 (N.J. Super. Ct. App. Div. 2004).

6. **Tennessee:** *Johnson* v. *Johnson*, 37 S.W.3d 892, 897-898 (Tenn. 2001).

On Contract Theory

7. **Alaska:** *Glover* v. *Ranney*, 314 P.3d 535, 543 (Alaska 2013).

8. **Colorado:** *In re Marriage of Lodeski*, 107 P.3d 1097, 1100 (Colo. App. 2004).

9. **Florida:** *Abernethy* v. *Fishkin*, 699 So. 2d 235, 240 (Fla. 1997).

10. **Hawaii:** *Perez* v. *Perez*, 110 P.3d 409, 414 (Haw. Ct. App. 2005).

11. **Idaho:** *McHugh* v. *McHugh*, 861 P.2d 113, 115 (Idaho Ct. App. 1993).

12. **Iowa:** *In re Marriage of Gahagen*, 690 N.W.2d 695, 2004 WL 1813601, at *5 (Iowa Ct. App. 2004) (Tbl.).

13. **Louisiana:** *Ast* v. *Ast*, 162 So. 3d 720, 723, 725 (La. Ct. App.), writ denied, 171 So. 3d 952 (La. 2015).*

14. **Maine:** *Black* v. *Black*, 842 A.2d 1280, 1284-1285 (Me. 2004).

15. **Maryland:** *Dexter* v. *Dexter*, 661 A.2d 171, 174-175 (Md. Ct. Spec. App.), cert. denied, 668 A.2d 36 (Md. 1995) (Tbl.).

16. **Massachusetts:** *Krapf* v. *Krapf*, 786 N.E.2d 318, 326 (Mass. 2003).

17. **Michigan:** *Megee* v. *Carmine*, 802 N.W.2d 669, 682 (Mich. Ct. App. 2010).

18. **Minnesota:** *Gatfield* v. *Gatfield*, 682 N.W.2d 632, 636 (Minn. Ct. App.), review denied (Minn. Sept. 29, 2004).

19. **Missouri:** *Strassner* v. *Strassner*, 895 S.W.2d 614, 618 (Mo. Ct. App. 1995).

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* Cf. *Brouillette* v. *Brouillette*, 51 So. 3d 898, 901 (La. Ct. App. 2010) (declining to order indemnification after veteran's post-divorce waiver of military retirement pay because Louisiana law gives the veteran "sole interest" in military disability benefits).

20. **Nevada:** *Shelton* v. *Shelton*, 78 P.3d 507, 509 (Nev. 2003), cert. denied, 541 U.S. 960 (2004).

21. **New Mexico:** *Hadrych* v. *Hadrych*, 149 P.3d 593, 596 (N.M. Ct. App. 2006), cert. denied, 152 P.3d 150 (N.M. 2007) (Tbl.).

22. **New York:** *Hoskins* v. *Skojec*, 696 N.Y.S.2d 303, 305 (N.Y. App. Div. 1999), leave to appeal denied, 726 N.E.2d 482 (N.Y. 2000).

23. **North Carolina:** *Hillard* v. *Hillard*, 733 S.E.2d 176, 180-181 (N.C. Ct. App. 2012), review denied, 736 S.E.2d 490 (N.C. 2013).

24. **Oklahoma:** *Hayes* v. *Hayes*, 164 P.3d 1128, 1131-1132 (Okla. Civ. App.), cert. denied (Okla. June 4, 2007).

25. **Oregon:** *In re Marriage of Hayes*, 208 P.3d 1046, 1053 (Or. Ct. App. 2009).

26. **Pennsylvania:** *Hayward* v. *Hayward*, 868 A.2d 554, 560-561 (Pa. Super. Ct. 2005).

27. **Rhode Island:** *Resare* v. *Resare*, 908 A.2d 1006, 1010 (R.I. 2006).

28. **South Carolina:** *Price* v. *Price*, 480 S.E.2d 92, 93 (S.C. Ct. App. 1996).

29. **South Dakota:** *Hisgen* v. *Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996).

30. **Virginia:** *Owen* v. *Owen*, 419 S.E.2d 267, 270 (Va. Ct. App. 1992).

Permitting Post-Divorce Waiver To Be Considered In Revising Alimony Award

31. **Arkansas:** *Ashley* v. *Ashley*, 990 S.W.2d 507, 509 (Ark. 1999).

32. **Nebraska:** *Kramer* v. *Kramer*, 567 N.W.2d 100, 113 (Neb. 1997).

33. **Washington:** *In re Marriage of Jennings*, 980 P.2d 1248, 1255-1256 (Wash. 1999) (en banc).

No Relief Under The Particular Circumstances
(But Not Reaching Express Indemnification Issue)

1. **Alabama:** *Ex parte Billeck*, 777 So. 2d 105, 109 (Ala. 2000).

2. **Kansas:** *In re Marriage of Pierce*, 982 P.2d 995, 998 (Kan. Ct. App.), review denied (Kan. Nov. 9, 1999).

3. **Kentucky:** *Copas* v. *Copas*, 359 S.W.3d 471, 479 (Ky. Ct. App. 2012). But see *Wilson* v. *Wilson*, No. 2004-CA-276, 2005 WL 2398020, at *3 (Ky. Ct. App. Sept. 30, 2005) (unpublished) (enforcing an indemnification provision after post-divorce waiver), review denied (Ky. Aug. 17, 2006).

4. **Vermont:** *Youngbluth* v. *Youngbluth*, 6 A.3d 677, 690-691 (Vt. 2010).

Indemnification Not Permitted

1. **Mississippi:** *Mallard* v. *Burkart*, 95 So. 3d 1264, 1272 (Miss. 2012).

2. **Ohio:** *Konieczny* v. *Konieczny*, No. 97-CA-83, 1998 WL 401835, at *2 (Ohio Ct. App. Mar. 27, 1998) (finding reimbursement for post-divorce waiver of retirement pay would violate federal law). But see *Blissit* v. *Blissit*, 702 N.E.2d 945, 948 (Ohio Ct. App. 1997) (enforcing "separate provision" of negotiated property settlement where husband agreed to pay wife "the difference" between the gross and disability military retirement pay).

3. **Texas:** *Limbaugh* v. *Limbaugh*, 71 S.W.3d 1, 17 (Tex. App. 2002).

No Decision On Point

1. Connecticut
2. Delaware
3. Georgia
4. Montana
5. New Hampshire
6. North Dakota
7. Utah
8. West Virginia
9. Wisconsin
10. Wyoming